

file



Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS

Application of Northern States Power Company
for a Permit to Abandon the Orienta Dam on the
Iron River, Town of Orienta, Bayfield County,
Wisconsin

Case No. 3-NW-95-04004

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Pursuant to due notice, including publication, hearing was held on February 18, 1998, at Washburn, Wisconsin before Jeffrey D. Boldt, administrative law judge (ALJ). By the agreement of the parties, the hearing was reconvened on April 14, 1998, at Park Falls, Wisconsin. By the further agreement of the parties, the 120 day waiting period began as of February 18, 1998. The Division waited 120 days or until June 18, 1998, prior to issuing this decision to allow for a change in ownership of the dam. The Division was not advised that "one or more municipalities or others" had agreed to acquire ownership of the dam within the meaning of sec. 30.185, Stats. On June 22, 1998, the Division informed the parties that a decision would be entered in the usual course of business on the permit to remove the dam within 30 days of said date.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

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Northern States Power Company, by

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FINDINGS OF FACT

1. Northern States Power Company, 100 North Barstow Street Eau Claire, Wisconsin, 54702, completed filing an application with the Department of Natural Resources (the Department) for a permit under sec. 31.185, Stats., to abandon and remove the Orienta Dam located on the Iron River at the location known as Orienta Falls, Town of Orienta, Iron County. The Department and the applicant have fulfilled all procedural requirements of sec. 31.06, Stats.

2. The applicant owns real property located in the NW ¼ of NW ¼ in Section 10, Township 50 North, Range 9 West, Bayfield County. The above-described property abuts the Iron River which is navigable in fact at the project site.

3. The applicant proposes to abandon and remove the Orienta Falls dam from the Iron River. The project would require the demolition and disposal of the existing concrete dam and the creation of a lamprey and fish barrier. The project site would be restored and stabilized through the use of riprap and burial of portions of the existing concrete. It is hoped that removal of the existing dam would facilitate return of a free-flowing river and restore natural scenic beauty.

4. The purpose of the proposed abandonment is to remove the existing dam structure which was largely destroyed in a flood in 1985. The hydro-electric dam has produced no power since that time, and the Federal Energy Regulatory Commission (FERC) license to produce electric power was surrendered in 1988. Substantial repairs would be needed to make the dam operational for hydro-electric power, and a new FERC license would have to be obtained. The applicant determined that it was not economically feasible for NSP to restore the dam and operate it to generate electric power. The economic considerations NSP considered included the costs of repairs, the cost of licensure, the small generation capacity of the site, and the distance between this and other NSP hydro-electric dam sites. NSP engineer Mark Fort testified that NSP operates 19 hydro-electric generating dams and that the Orienta Falls dam was the second smallest dam operated by the company. In 1986, a consultant for NSP estimated the cost of repairing the dam to restore electric power generation as approximately one million dollars.

5. The reservoir behind the dam was drawn-down in 1996. Since that time, vegetation has been re-established and there is now lush growth on the exposed mudflats. (See: Exs.27-30, 34) DNR Area Water Management Specialist Duane Lahti testified that the banks in the former reservoir area have largely stabilized and that it is likely that some portions of the area will make a transition to wetland over the near term.

6. NSP and the DNR entered into a Memorandum Agreement (the Agreement) relating to the proposed abandonment on July 17, 1997. The Agreement provides that NSP will bear the cost of dam demolition and removal. It further provides that the Department bear the cost of installation of the lamprey and fish barrier.

7. There will be no detrimental impact on the public interest in maintaining fishery values in the area, so long as the fish barrier and lamprey barrier are installed. The sea lamprey is an exotic parasite which has made its way from the Atlantic Ocean into Lake Superior. There was no dispute in the record that an appropriate barrier blocking passage of lamprey can be constructed. Such a barrier is necessary to protect the Iron River watershed from sea lamprey infestation.

Anglers and the Department have expressed interest in restoring salmonid passage from Lake Superior into the Iron River watershed. However, in 1978 a Federal fish hatchery was constructed at the headwaters of the Iron River. The United States Fish and Wildlife Service (USFWS) and the Department have concerns about the possible transmission of diseases from

Lake Superior fish, especially salmonids bearing pathogens of concern, to USFWS hatchery fish. The Department formally agreed at hearing that the fish barrier will not be removed until appropriate controls are installed to help protect hatchery fish from the risk of disease. Further, the DNR agreed that it would be prepared to Public Notice and allow a separate contested case proceeding if such disease-prevention measures became available and the DNR sought to remove the fish blocking barrier. Under no circumstances would the sea lamprey barrier be removed.

The DNR presented un rebutted expert testimony that a barrier could be installed that would prevent infiltration of sea lamprey and diseased salmonids into the Iron River (Koon, Pratt, Lasee). All of the experts agreed that the only species with any remote chance of passing the barrier was the American Eel. American Eel are extremely rare in the Orienta Falls area. (Ex. 55) None have been documented in Wisconsin trout streams for over twenty years. Further, the likelihood of a rare American Eel making its way over the lamprey/fish barrier is slim. (Id.) The ALJ accepts the reasoning of Mr. Pratt: "In summary, we expect that only a very slim chance exists that an American eel would surmount the proposed sea lamprey barrier/fish barrier at Orienta Falls because they are extremely rare to begin with, not attracted to the type of habitat that presently exists upstream of the falls, and in the case that one did pass upstream it would not likely be attracted to the cold water trout stream that the Iron River National Fish Hatchery is located in the head waters of." (Ex. 55)

8. The DNR analyzed sediment data provided by NSP in the project area which indicated that there is no significant risk to water quality posed by removal of sediments. All standard inorganic compounds were at or below expected regional "background" level. The same was true for all organic compounds analyzed, except for one sample of heptachlor found at the level of detection. Further, an earlier DNR sample of sediments ran at lower detection levels was also a non-detect. Mr. Frank Koshere of the DNR concluded that, "It is safe to assume there is not (a) sediment contaminant problem from the data given, and the data appears adequate." (Ex. 38) The proposed project will not result in detrimental impacts to water quality.

9. Removal of the dam will not be a threat to life, health or property in the area. A retired State of Wisconsin Department of Transportation employee, Paul Jones, testified on behalf of opponents to dam abandonment. Jones, an engineering technician with vast experience with Lake Superior soils, expressed his opinion that dam abandonment could pose a risk to the Johnson property located north east of the dam. Jones opined that this risk was highest during flood conditions.

However, NSP engineer Fort was persuasive that the removal of the dam would not have an impact on the flood flow of the river because the dam had always released its gates during flood conditions. Further, Fort testified that the reservoir behind the dam had virtually no flood storage capacity because the reservoir was maintained at or near its water storage capacity. Any additional input of water had to be passed through the dam by the release of the flood gates as it was regularly operated. Accordingly, removal of the dam would not have a significant detrimental impact on flood storage capacity for any unusually heavy rainfall events. Under these circumstances the record does not support requiring NSP to install an inclinometer to get a baseline measurement to monitor erosion in the area. The record as a whole supports a finding that the abandonment proposal does not pose a threat to nearby property. Even Jones agreed that

there was no imminent threat to the Johnson property and that the property owner would have ample opportunity to install erosion control measures. Based on the record as a whole, a clear preponderance of the credible evidence supports a finding that the abandonment as proposed does not pose a risk to nearby property.

10. The proposed dam abandonment will not be detrimental to the public interest in navigable waters upon compliance with the conditions of this permit. All of the conditions set forth below are reasonably necessary to protect the public rights in navigable waters or to promote safety and protect life, health and property.

DISCUSSION

All of the municipal entities in the area including the Town of Orienta and Bayfield County appeared at hearing to register opposition to the abandonment proposal. However, none of these governmental units have stepped forward with the financial resources necessary to restore and operate the dam. Under these circumstances, the only issue before the Division is whether the abandonment proposal meets statutory standards. A clear preponderance of the credible evidence, including virtually all of the expert testimony, indicates that the abandonment proposal will not interfere with public rights in navigable waters, and will not cause environmental pollution and will not pose a threat to neighboring properties.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority pursuant to sec. 227.43 and sec. 31.185, Stats., to hear contested cases and enter necessary orders relating to permits to abandon dams. Hearing in this matter was held on February 19, 1998, and the administrative law judge deferred issuing the Order until after June 18, 1998, to allow a period of 120 days for any municipality or other persons or associations an opportunity to acquire ownership of the dam. Section 30.185(4), Stats. No such municipality, persons, or organization have made themselves known to the administrative law judge.

2. The Department has authority under sec. 31.185, Stats., and in accordance with the foregoing findings of fact, to grant a permit to abandon Orienta Dam as herein described, subject to the conditions contained in the order. All of the permit conditions set forth below are reasonably necessary to preserve public rights in navigable waters, to promote safety, and to protect life, health and property.

3. The Department has complied with the procedural requirements of sec. 1.11, Stats. The Department prepared an Environmental Assessment which concluded that the proposed dam abandonment would not be a major action significantly affecting the quality of the human environment.

PERMIT

AND HEREBY THERE DOES ISSUE AND IS GRANTED to the applicant, Northern States Power Company, a permit to abandon the Orienta Dam on the Iron River, Town of Orienta, Bayfield County, subject to the conditions contained in the Order which follows.

1. The permittee shall submit final removal plans and specifications for approval by the Department. No work or removal shall commence until approval of final plans and specifications by the DNR.
2. The permittee shall participate in a pre-construction meeting with all interested parties (NSP, DNR, USFWS, the contractor, the objectors & GLIFWC) prior to construction to ensure that final plans and specifications are properly executed.
3. Erosion control methods must be specified in final plans and specifications. The project shall meet or exceed the minimum protection standards described in the "Wisconsin Construction Site Best Management Handbook."
4. Final plans and specifications shall include proper disposal and treatment of demolition material. Portions of broken concrete to be used as fill shall not include exposed rebar.
5. No fish passage shall be permitted until appropriate upstream barriers are in place.
6. Lamprey and fish barriers must be in place concurrent with dam removal under the terms set forth in the Memorandum Agreement. The Department shall inspect the barriers for cracks on an annual basis. Removal of the fish/lamprey barrier shall constitute a final determination of the Department and shall be noticed to the public and be subject to a separate contested case proceeding if there are objections.
7. The waterway for flow and navigation in the vicinity of the structure shall be restored as nearly as practicable to its conditions prior to the original construction of the dam.
8. The permittee shall waive any objection to the free and unlimited access to the project site at any time by any Department employee who is investigating the project.
9. The authority granted herein can be amended or rescinded if the project obstructs navigation or becomes detrimental to the public interest or if necessary to protect the environment.


10. The permittee shall provide a copy of this permit to its contractor and keep a copy at the project site at all times until the project has been completed.
11. The permittee shall notify Mr. Duane Lahti, Area Water Management Specialist for the Department of Natural Resources, in writing not less than ten days prior to commencing the abandonment and again not more than ten days after competition.
12. The permittee shall obtain any necessary authority needed under local zoning ordinances and from the U.S. Army Corps of Engineers.
13. Acceptance of this permit shall be deemed acceptance of all conditions herein.

ORDER

IT IS HEREBY ORDERED that the applicant be granted a permit to abandon the above-described dam, subject to the conditions set forth above.

Dated at Madison, Wisconsin on July 13, 1998.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.